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OFFICE OF PETITIONS

In re Application of :
Hansen :
Application No. 10/553,143 : DECISION
Filed: 14 October, 2005 :
Attorney Docket No. 133630-0003 :

This is a decision on the petition, filed on 21 November, 2008 (and supplemented and/or resubmitted on 17 December, 2008), for revival of an application abandoned due to unavoidable delay under 37 C.F.R. §1.137(a); the petition was supplemented further on 30 January, 2009, to be considered as a petition under 37 C.F.R. §1.181 (no fee) requesting withdrawal of the holding of abandonment in the above-identified application, with an additional supplement filed of record thereafter.

The petition under 37 C.F.R. §1.181 is **GRANTED**; in light of the supplemental showing, the petition under 37 C.F.R. §1.137(a) is **DISMISSED**.

As to Allegation of
Unavoidable Delay

The requirements of a grantable petition pursuant to 37 C.F.R. §1.137(a) are the petition and fee therefor, a reply, a proper showing of unavoidable delay under the regulation, and, where applicable, a terminal disclaimer and fee. (However, it does not appear that a terminal disclaimer and fee are due here.)

As to the Request to Withdraw
the Holding of Abandonment

Petitioners always are directed to the Commentary at MPEP §711.03(c)(I) for guidance as to the proper showing and timeliness requirements for relief under 37 C.F.R. §1.181. Petitioners must,

inter alia, provide statements and documentary support as set forth in the Commentary at MPEP §711.03(c)(I).

BACKGROUND

The record reflects as follows:

Petitioner failed to reply timely and properly to the non-final Office action mailed on 12 December, 2007, with reply due absent extension of time on or before 12 March, 2008.

The application went abandoned after midnight 12 March, 2008.

The Office mailed the Notice of Abandonment on 30 June, 2008.

Thereafter:

- On 21 November, 2008, Petitioner filed a petition (with fee) pursuant to 37 C.F.R. §1.137(a) averring unavoidable delay but also suggesting non-receipt (properly considered under 37 C.F.R. §1.181), and but did not submit the required reply in the form of an amendment;
- On 17 December, 2008, Petitioner submitted a supplement again pursuant to 37 C.F.R. §1.137(a), again suggesting non-receipt, but did not submit the required reply;
- On 30 January, 2009, Petitioner filed a request to withdraw the holding of abandonment pursuant to 37 C.F.R. §1.181, and made therein a statement of non-receipt and of search and non-discovery with a partial description of Petitioner's docketing system—but did not move stepwise through the guidance set forth in the Commentary at MPEP §711.03(c)(I).

Nonetheless, a search of Office records by Office technical personnel revealed that:

- The 12 December, 2007, Notice of the non-final Office action was to be transmitted to Petitioner electronically on that date, but was not; and
- The 12 December, 2007, non-final Office action was not uploaded into the Image File Wrapper (IFW) until on or about 19 November, 2008, almost a year after the Office action and months after the 30 June, 2008, Notice of Abandonment.

For reference: Petitioner's attentions are directed to the guidance set forth in the Commentary at MPEP §711.03(c)(I)—and with particularity to the requirements therein of statements of non-receipt at the address of record, search and non-discovery, with a description of docketing

system and a statement of its reliability, and support for those the statements with copies of the docket record/file jacket cover and due date calendar/docket. Moreover, Petitioner is reminded that the requirements of the regulations at under 37 C.F.R. §1.181 impose upon Petitioner a duty to seek relief there under within two (2) months of the act complained of.

Out of an abundance of caution, Applicants always are reminded that those registered to practice and all others who make representations before the Office must inquire into the underlying facts of representations made to the Office and support averments with the appropriate documentation—since all owe to the Office the continuing duty to disclose.¹

The availability of applications and application papers online to applicants/practitioners who diligently associate their Customer Number with the respective application(s) now provides an applicant/practitioner on-demand information as to events/transactions in an application.

STATUTES, REGULATIONS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994). And the regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a Petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application.^{2,3}

Moreover, the Office has set forth in the Commentary at MPEP §711.03(c)(I) the showing and timeliness requirements for a proper showing for relief under 37 C.F.R. §1.181 in these matters.

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits

¹ See supplement of 17 June, 1999. The Patent and Trademark Office is relying on Applicant's duty of candor and good faith and accepting a statement made by Applicant. See Changes to Patent Practice and Procedure, 62 Fed. Reg. at 53160 and 53178, 1203 Off. Gaz. Pat. Office at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. §10.18 to inquire into the underlying facts and circumstances when providing statements to the Patent and Trademark Office).

² See: Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

³ The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition. (Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.) Delays in responding properly raise the question whether delays are unavoidable. Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) And the Petitioner must be diligent in attending to the matter. Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care. (By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.))

them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.⁴

Allegations as to the Request to
Withdraw the Holding of Abandonment

The record evidences a satisfactory presentation, when taken as a whole, of the showing requirements under the Rule consistent with the guidance set forth in the Commentary at MPEP §711.03(c)(I).

As to Allegations of
Unavoidable Delay

The requirements pursuant to 37 C.F.R. §1.137(a) are petition, fee, proper reply and showing of unavoidable delay. It appears that the petition pursuant to 37 C.F.R. §1.137(a) is moot.

CONCLUSION

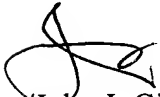
Accordingly, The petition as considered under 37 C.F.R. §1.181 is **granted**, and the 30 June, 2008, Notice of Abandonment is **vacated**. The petition under 37 C.F.R. §1.137(a) is **dismissed as moot** and the petition fee is refunded via to Deposit Account 12-2136. Should Petitioner later find that the fee has not been refunded, Petitioner should make request of the Office of Finance and provide with the request a copy of this decision.

The instant application is released to the Technology Center/AU 3733 for further processing as necessary in due course.

Petitioner may find it beneficial to view Private PAIR within a fortnight of the instant decision to ensure that the revival has been acknowledged by the TC/AU in response to this decision. It is noted that all inquiries with regard to that change in status need be directed to the TC/AU where that change of status must be effected—that does not occur in the Office of Petitions.

⁴ In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

Telephone inquiries regarding this decision may be directed to the undersigned at (571) 272-3214—it is noted, however, that all practice before the Office is in writing (see: 37 C.F.R. §1.2⁵) and the proper authority for action on any matter in this regard are the statutes (35 U.S.C.), regulations (37 C.F.R.) and the commentary on policy (MPEP). Therefore, no telephone discussion may be controlling or considered authority for Petitioner's action(s).



/John J. Gillon, Jr./
John J. Gillon, Jr.
Senior Attorney
Office of Petitions

⁵ The regulations at 37 C.F.R. §1.2 provide:

§1.2 Business to be transacted in writing.

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/553,143	10/13/2006	Doris Hjorth Hansen	133630-0003	2276
50659	7590	12/12/2007		
Thomas Moga Butzel Long STONERIDGE WEST 41000 WOODWARD AVENUE BLOOMFIELD HILLS, MI 48304			EXAMINER SIGLER, JAY R	
			ART UNIT 4111	PAPER NUMBER
			NOTIFICATION DATE 12/12/2007	DELIVERY MODE ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

ball@butzel.com
patent@butzel.com
burns@butzel.com

Office Action Summary	Application No.	Applicant(s)	
	10/553,143	HANSEN, DORIS HJORTH	
	Examiner	Art Unit	
	JAY R. SIGLER	4111	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) ☒ Responsive to communication(s) filed on 13 October 2006.

2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.

3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) ☒ Claim(s) 1-7 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) ☐ Claim(s) _____ is/are allowed.

6) ☒ Claim(s) 1-4 and 7 is/are rejected.

7) ☒ Claim(s) 5 and 6 is/are objected to.

8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) ☒ The specification is objected to by the Examiner.

10) ☒ The drawing(s) filed on 14 October 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) ☒ All b) ☐ Some * c) ☐ None of:

1. ☐ Certified copies of the priority documents have been received.

2. ☐ Certified copies of the priority documents have been received in Application No. _____.

3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)

2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 14 October 2005.

4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____

5) ☐ Notice of Informal Patent Application

6) ☐ Other: _____

DETAILED ACTION

Specification

1. The title of the invention is not descriptive. A new title is required that is clearly indicative of the invention to which the claims are directed.

The following title is suggested: Suture band having a locking mechanism with wedging means.

Claim Objections

2. Claims 5 and 6 are objected to under 37 CFR 1.75(c) as being in improper form because a multiple dependent claim cannot depend from any other multiple dependent claim. See MPEP § 608.01(n). Accordingly, the claims 5 and 6 have not been further treated on the merits.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1, 2, and 7 are rejected under 35 U.S.C. 102(b) as being anticipated by Golds (U.S. Patent 5,356,417).

- a. Concerning claim 1, Golds teaches a **suture band device (10) comprising an elongated flexible band (12) having first and second ends, a needle (46) attached to the first end of the band, a buckle (14) attached proximate the second end of the band for receiving and locking the band**

Art Unit: 4111

(see Abstract), **characterized in that the buckle comprises a locking mechanism (16 and 18) which enables the band to be locked at any point along its length (col. 5, ll. 57-63; embodied by the strap tightened to desired tension and Fig. 1-4) and in that the locking mechanism comprises a wedging means (18).**

b. Concerning claim 2, the locking mechanism substantially prevents retrograde movement of the band through the buckle (col. 5, ll. 67-68; embodied by teeth 28 preventing slippage of the strap in the housing).

c. Concerning claim 7, Golds teaches a method of approximating bone tissue comprising encircling said tissue with a suture band device as defined in paragraph 4(a) above, threading a buckle of the suture banding device with a band of the suture banding device, and constricting the device around the bone tissue (col. 5, ll. 43-68)

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 3 and 4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Golds (U.S. Patent 5,356,417) as applied to claim 1 or 2 above, and further in view of Chopp, Jr. et al. (U.S. Patent 4,399,592).

- d. Concerning claim 3, Golds teaches the claimed invention including a locking mechanism with a wedging means, but does not teach the wedging means having a substantially spherical or cylindrical body. Chopp, Jr. et al. teaches a device used to encircle and hold objects together, that includes a band 26 and a locking mechanism 24 with a wedging means 28 that is substantially spherical for lockingly engaging the strap (see Abstract). The claim would have been obvious because the substitution of one known element, namely the locking mechanism of Golds, for another, the locking mechanism of Chopp, Jr. et al., would have yielded predictable results to one of ordinary skill in the art at the time of the invention. The predictable results being to lockingly engage the strap.
- e. Concerning claim 4, the wedging means of Chopp, Jr. et al. includes a roughened surface (col. 3, ll. 15-17).

Conclusion

7. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAY R. SIGLER whose telephone number is (571)270-3647. The examiner can normally be reached on Monday through Thursday from 8 AM to 4 PM (EST).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sam Yao can be reached on (571) 272-1224. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 4111

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

JRS

/Sam Chuan C. Yao/
Supervisory Patent Examiner, Art Unit 4111